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IN THE

Supreme Court of the United States

October Term, 1966
No. 581

LARRY THEODORE FRENCH,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered June 3, 1966, be affirmed, and/or that the appeal taken therefrom to this Court, be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

This is a direct appeal from a judgment entered June 3, 1966, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District with having committed two violations of California Penal Code Section 314.1. It was alleged that appellant "did willfully and unlawfully lewdly expose his person, and the private parts thereof, in a public place and in a place where there were present other persons to be offended and annoyed thereby, to wit: Ventura Boulevard."

The case was tried by the court without a jury. The appellant was adjudged guilty of Count I and not guilty of Count II. An appeal was duly taken to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matter was submitted and thereafter the judgment was affirmed. (Jurisdictional Statement, Appendix "A".) A notice of appeal to this Court was thereafter presented.

ARGUMENT.

I.

California Penal Code Section 314.1 Is Neither Vague, Indefinite nor Uncertain.

California Penal Code Section 314.1:

> "Every person who willfully and lewdly, either (1) Exposes his person, or the private parts thereof, in any place, or in any place where there are present other persons to be offended or annoyed thereby; . . . is guilty of a misdemeanor. . . ."

On February 2, 1965, Eddie Joan Knowles observed the appellant walking on Ventura Boulevard, a public street in the City of Los Angeles. The appellant was the only other person on the street. At a distance of twenty feet, she could see that the zipper of his pants was open and the appellant had his private parts exposed. [R.T. p. 56.] The appellant passed by the complaining witness and then zipped up his pants. [R.T. p. 58.]

After Miss Knowles made a phone call to the police, she observed the appellant a second time. He again had his pants unzipped and his private parts were exposed. [R.T. p. 59.] The appellant looked at the witness, but did not say anything. [R.T. p. 61.] He zipped up his pants again. [R.T. p. 62.]

Appellant's Jurisdictional Statement challenges the constitutionality of the words "willfully", "lewdly" and "private parts" as used in California Penal Code Section 314.1.

"Willfully" when applied to the intent with which an act is done, implies simply a purpose or willingness to commit the act. (California Penal Code Sec. 7.1; *People v. Beaugez,* 232 Cal. App. 2d 650, 43 Cal. Rptr. 28.)

People v. Loignon, 160 Cal. App. 2d 412, 325 P. 2d 54, held that the word "lewdly" did not render a statute too vague to meet the requirements of due process. "Lewd" is defined to mean: lustful; libidinous; lascivious unchaste. (*People v. Babb,* 103 Cal. App. 2d 326, 229 P. 2d 843.) In *Winters v. New York,* 337 U.S. 507, 92 L. Ed. 2d 840, the court held that words such as "obscene, lewd, lascivious, filthy, indecent or disgusting" are well understood through long use in criminal law.

The term "private parts" used in describing a part of the human body refers to the genital organs. (*Clark v. People,* 79 N.E. 941, 224 Ill. 554; *State of Nash,* 145 Atl. 262, 83 N.H. 536; *State v. Moore,* 241 P. 2d 455, 194 Ore. 232; *Pendell v. State,* 253 S.W. 2d 426, 158 Tex. Crim. R. 119.) Webster's Third New International Dictionary (1967) defines "part" as: "a portion of a plant or animal body: the external genital and excretory organs—usually used in plural; called also private parts." A similar definition may be found in Webster's Seventh New Collegiate Dictionary (1965).

To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough

known to enable those persons within its reach to understand and correctly apply them.

Appellee contends that the term "private parts" is a term of common use and that further definition is not needed. Words used in a statute are to be taken in the ordinary and general sense. When the statute prohibits the exposure of the person or the private parts thereof, it is prohibiting the exposure of those private parts of a person which instinctive modesty, human decency or self-respect requires shall be customarily covered in the presence of other persons. The evidence at trial established that the appellant, while walking on a public street, willfully and lewdly exposed his private parts.

The words "willfully", "lewdly" and "private parts" are neither vague nor indefinite. The public is not uncertain as to the conduct prohibited by Penal Code 314.1, nor are judges or jurors left free to decide, without any legal standard, what is prohibited and what is not in each particular case. (*Giaccio v. Pennsylvania,* 382 U.S. 399, 15 L. Ed. 2d 447.) Reasonable men of common intelligence need not guess at the meaning nor differ as to the application of Penal Code Section 314.1.

II.

The Supreme Court of the United States Should Not Take Jurisdiction to Review an Order Where No Opinion Was Delivered by the Highest State Court.

Appellant is incorrect when he states that the Appellate Department of the Superior Court was "the last court to which the question could be taken." Under California Rules of Court, Rule 63, the Superior Court on application of a party may certify that the transfer of a case to the District Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law.

After the Appellate Department of the Superior Court affirmed the judgment, the appellant did not petition for a rehearing and/or Certification to the District Court of Appeal. Therefore the judgment he appeals from is not from the last state court to which the question could be taken. (*Schmerber v. California,* 384 U.S. 757, 16 L. Ed. 2d 908, Ftn. 3.)

Though Penal Code Section 314.1 has been referred to in numerous cases (*In re Lane,* 58 Cal. 2d 99, 372 P. 2d 897; *In re Mikkelsen,* 226 Cal. App. 2d 467, 38 Cal. Rptr. 106; *In re Luce,* 64 A.C. 9, 409 P. 2d 918; *In re Davis,* 242 A.C.A. 760, 51 Cal. Rptr. 701; hearing denied, 65 A.C. No. 1 minutes p. 3), neither the California Supreme Court, nor the District Court of Appeal has expressly considered the constitutionality of the section. However, there has been no ruling in any California case that would cast doubt on the constitutionality of the statute.

In *Stembridge v. Georgia,* 343 U.S. 541, 96 L. Ed. 1130, it was held that where the highest court of the state delivers no opinion and it appears the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment.

The Appellate Department of the Superior Court delivered no opinion when it affirmed the judgment. The appellant did not give the highest court of the state an opportunity to rule on the question he raises in this appeal.

Conclusion.

The appeal does not disclose that there has been a violation of appellant's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not theretofore determined by this court.

Appellee urges, therefore, that the appellant presents no substantial question for the decision of this court; that the judgment sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

PHILIP E. GREY,
Assistant City Attorney,

EDWARD L. DAVENPORT,
Chief Deputy City Attorney,

MICHAEL T. SAUER,
Deputy City Attorney,

Attorneys for Appellee.